

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 23-93:

WOLF POINT EDUCATION  
ASSOCIATION, MEA, NEA,

Complainant,

-vs-

WOLF POINT PUBLIC SCHOOL  
DISTRICTS NO. 45 AND 45A,

Defendant.

FINDING OF FACTS, CONCLUSIONS  
OF LAW AND RECOMMENDED  
ORDER

\* \* \* \* \*

I. INTRODUCTION

This matter came on for hearing before Gordon D. Bruce, Hearing Examiner, on April 28, 1994 at the hour of 4:00 o'clock p.m. The hearing was held in the Conference room of Sherman Motor Inn. The time and place of the hearing were previously agreed to between the parties. The Wolf Point Education Association, MEA, NEA, (Complainant) was represented by its counsel, John K. Addy, Esq. Wolf Point Public School Districts No. 45 and 45A (Defendant) was represented by Mr. Rick D'Hooge, Labor Relations Director. Parties filed their final post-hearing briefs in July 1994.

II. ISSUE

Did the Wolf Point School District violate Section 39-31-305(1) and (2), MCA, constituting an unfair labor practice as set forth in Section 39-31-401(5), MCA, as contended by the Complainant in this matter.

Essentially, the Complainant believes that if there is a long-standing practice which is clearly understood between the parties, the Defendant cannot impose a unilateral change in working

1 conditions upon the teachers, as it allegedly did here, unless they  
2 at least meet and confer about the proposed change.

3 In juxtaposition, the Defendant essentially argues that unless  
4 a working condition is expressly set forth in the Collective  
5 Bargaining Agreement, they had the right to change work assignments  
6 by 10 minutes, to increase class schedules by 10 minutes and/or to  
7 increase the hours of instruction by 10 minutes under the  
8 "management rights" clause.

9 **III. BACKGROUND FACTS (Pleading & Charges in part)**

10 On December 8, 1993, Defendant filed its "Amended Unfair Labor  
11 Practice Charge" as follows in part:

12 1. The Wolf Point Education Association, MEA/NEA is the  
13 exclusive representative of teachers employed by the Wolf  
14 Point Public Schools.

15 2. Since the Defendant first instituted the unilateral  
16 changes subject to this dispute, the parties have bargained a  
17 successor agreement to the 1990-92 Contract. This successor  
18 agreement does not resolve the dispute between the Complainant  
19 and Defendant with regard to the duty-free lunch period as  
20 that issue is set forth below in this matter. (Exhibits A and  
21 B)

22 3. On September 16, 1992, the Complainant's teachers at  
23 Northside Elementary School received a verbal directive from  
24 Principal, Gordon Friberg assigning them student supervision  
25 duty during duty-free lunch period. The duty was to begin on  
26 September 21, 1992.

27 4. The directive assigned Complainant teachers at Northside  
28 Elementary to their classrooms during the lunch period for the

1 purpose of student supervision. Prior to defendant's  
2 directive, this lunch period had been duty-free.

3 5. On September 18, 1992, Complainant notified Defendant of  
4 the unilateral change and demanded to bargain over the change.  
5 (Exhibit C)

6 6. On September 21, 1992, Defendant admitted the change was  
7 a subject of collective bargaining, but again ordered  
8 Complainant to comply with the directive. (Exhibit D)

9 7. . . .

10 8. . . .

11 9. Between the conclusion of the 1992-93 school year and the  
12 commencement of the 1993-94 school year, Defendant amended the  
13 assignments to Complainant of student supervision during  
14 complainant's duty-free lunch period. This assignment of  
15 supervision responsibilities during what had theretofore been  
16 a duty-free lunch period was the basis of the original  
17 complaint filed herein. The new assignment of student  
18 supervision responsibilities during the 1993-94 school year  
19 was even more onerous than the 1992-93 school roster.  
20 (Exhibit E)

21 10. On August 24, 1993, Complainant notified Defendant  
22 formally and in writing that this unilateral change in working  
23 conditions was not accepted and requested that Defendant  
24 submit the issue to collective bargaining. (Exhibit F)

25 11. . . .

26 12. . . .

27 (See Exhibit J-23)

1        Additionally, although the Complainant processed the complaint  
2 through the grievance procedure, the grievance procedure contains  
3 no election of remedies language, consequently a ULP was formally  
4 filed .

5        (Exhibit J-8)

6        The record also reflects the Complainant waived any claim to  
7 back pay at the outset of the hearing. They simply seek a  
8 determination that the administration is required to meet and  
9 confer with them prior to instituting a change in working  
10 conditions, and that an Order should issue prohibiting any changes  
11 in the long-standing practice of a duty-free lunch period until the  
12 administration does meet and confer with the teachers.

13        IV.       FINDINGS OF FACT<sup>1</sup>

14        1.       The School District consists of three major buildings;  
15 the Southside School, consisting of several kindergarten, first,  
16 second and third grade classes; the high school; and the Northside  
17 School consisting of several classes of fourth, fifth and sixth  
18 grades.

19        (Testimony Principal Friberg)

20        2.       Prior to September 16, 1992, the Northside School  
21 teachers, except for those on lunch duty, were all dismissed from  
22 their classrooms for the lunch period. The students were left in  
23

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24        <sup>1</sup>All proposed findings, conclusions and supporting arguments  
25 of the parties have been considered. To the extent that the  
26 proposed findings and conclusions submitted by the parties, and the  
27 arguments made by them, are in accordance with the findings,  
28 conclusions and views stated herein, they have been accepted, and  
to the extent they are inconsistent therewith, they have been  
rejected. Certain proposed findings and conclusions may have been  
omitted as not relevant or as not necessary to a proper determina-  
tion of the material issues presented. To the extent that the  
testimony of various witnesses is not in accord with the findings  
herein, it is not credited.

1 their classrooms unsupervised and the Principal would patrol the  
2 hallway and dismiss the classes on a rotation basis.

3 (Testimony Principal Friberg)

4 3. Due to concerns for safety of the students, Principal of  
5 Northside School, Mr. Friberg, on September 16, 1992, gave verbal  
6 directive to the Complainant, assigning teachers at Northside  
7 School to their classrooms during the lunch period for the purpose  
8 of student supervision, thereby altering the time for their duty-  
9 free lunch period. (Testimony of Teachers Sue Patch and Patricia  
10 Taovs and Richard Desch-President Wolf Point Education Association  
11 and Mr. Friberg)

12 4. Principal Friberg was concerned about maintaining  
13 appropriate supervision of some two-hundred forty-eight elementary  
14 students during the lunch hour and determined changes in the  
15 teachers' duty-free lunch time was necessary to accommodate  
16 supervision needs. In denying Complainants' grievance as a result  
17 of the changes, teachers were advised in part:

18 "It appears that the union has lost sight of the fact  
19 that we are all here for the children. Without the  
20 children, we have no job to do. It is for the safety,  
21 guidance and instruction of the students that we must  
22 maintain supervision of the ... elementary students  
23 during the lunch hour."

24 (Exhibit D-4)

25 5. The subject of the change in the teachers' duty free  
26 lunch was not discussed in 1992 during any collective bargaining  
27 negotiations between the parties prior to the change made by the  
28 Principal. There was some discussion with staff and Principal

1 Friberg concerning the duty free lunch, but the exact extent of  
2 those conversations are unclear in the record. It is clear,  
3 however, that there were discussions concerning the cost of  
4 additional tables for the lunchroom costing \$2,300.00 each.

5 6. In all events, by letter dated September 21, 1992, the  
6 Wolf Point Schools District Superintendent informed Richard Desch,  
7 President of the Association (Complainant) that Northside teachers  
8 would follow Principal Friberg's directive regarding the matter  
9 until resolution of the issue at the bargaining table.

10 (Exhibit C-3) (Testimony Friberg)

11 7. Subsequently, a new duty roster was instituted by weekly  
12 bulletin on September 28 - October 2, 1992, indicating new duty and  
13 in-room supervision would start on Monday, September 28, 1992.  
14 The District wrote to the teachers, stating that they would "be  
15 looking forward to your proposals regarding teacher responsibility  
16 for student supervision" during the lunch hour.

17 (Exhibit C-3)

18 8. The credible testimony of Richard Desch revealed that no  
19 such proposals were presented to the school board bargaining team  
20 by the Complainant because they believed past practice indicated  
21 that teachers had a duty-free lunch. And, the Defendant brought no  
22 proposals forward because the collective bargaining agreement did  
23 not contain specific language regarding a duty-free lunch period;  
24 therefore, they felt administration was free, under the management  
25 rights clause of the collective bargaining agreement between the  
26 parties, to make whatever changes they wished.

27 9. The record also reflects that Defendant set forth  
28 additional changes in working conditions between the 1992-93 school

1 year and the 1993-94 school year which were described as follows by  
2 Susan K. Patch, Northside WPEA Building Representative by letter  
3 dated August 24, 1993, to Principal Friberg:

4 "Even though you "discussed" the new lunch schedule with  
5 us, it was imposed on us by you as administrator. It was  
6 not mutually agreed on nor did it involve teacher  
7 discussion, suggestions, or input. As was pointed out to  
8 you at the staff meeting on August 23, 1993, you again  
9 have changed our working conditions without discussing it  
10 with us and that we do not agree with what has been done.  
11 Not only have you changed our working conditions, you  
12 have shortened our 45 minute (11:30 a.m. - 12:15 p.m)  
13 lunch period to 35 minutes.

14 We all agree that a schedule of some sort must be in  
15 place and that agreement does not mean acceptance nor  
16 approval of what has been done. The ULP still stands and  
17 will now be amended to include this year's changing of  
18 our working conditions again without our input or  
19 approval."

20 (Exhibit C-5) (Emphasis added)

21 10. The before mentioned duty-free lunch period was set forth  
22 in writing in the policy handbook that the District gave to the  
23 teachers at the beginning of the 1992-93 school year. It was also  
24 contained in the handbook prior to the beginning of the 1992-93  
25 school year. When the teachers returned from the summer 1993  
26 break, the handbooks had been changed with a red "x" through the  
27 paragraph referencing duty-free lunch.

28 (Testimony Ms. Patch)

1 11. Those changes made by Defendant in the 1993-94 school  
2 year actually decreased the number of minutes individuals were  
3 assigned duties. In 1992-93 the average teacher had 2325 minutes  
4 of duties. In 1993-94 the average teacher had 1685 minutes of  
5 duties.

6 (Testimony Principal Friberg)

7 12. Prior to September 16, 1992, there were changes in the  
8 lunch periods and duty hour day of the teachers. The record does  
9 not reflect a substantial list of unilateral changes made by  
10 management prior to September 92, but certain incidents of  
11 unequivocal changes were made without vote or approval of the  
12 teachers. Nevertheless, informal conversations with the teachers  
13 were undertaken prior to the final decisions made by management,  
14 albeit Defendant did not necessarily follow the teachers'  
15 recommendations. Certain changes were made by management as  
16 follow:

17 a) At the Northside School in approximately the 1987-88  
18 school year, the District made changes to the work  
19 schedule to accommodate an early out on Friday's  
20 schedule.

21 b) Some years ago, the high school changed from a six  
22 period day to a seven period day and from a split lunch  
23 period to one lunch period.

24 c) Approximately three years ago the District added a  
25 "short teacher" to the noon schedule. Consequently, this  
26 decreased the number of duty-free lunch periods the  
27 teachers at the Northside School had in a school year.

28 (Testimony Michael Preyer, Principal)



1 d) In approximately 1980, duty free lunch time was  
2 reduced by the District from 1 hour to 45 minutes, which  
3 it remained until unilaterally reduced to 35 minutes by  
4 Defendant. There is nothing in the record indicating the  
5 type of informal conversations between parties that may  
6 have preceded the change in 1980, but Teacher Susan  
7 Patch's credible cross examination testimony revealed  
8 that lunch hours had never before been discussed in  
9 formal negotiations. (Testimony Susan Patch)

10 e) Patricia Toavs, who had taught at Northside school  
11 for 11-12 years was not aware the duty free lunch issue  
12 had ever been presented as a "change" for discussion in  
13 contract negotiations.

14 13. Clearly, the 1990-92 Collective Bargaining Agreement  
15 states that the "Board" (Defendant) shall retain without limitation  
16 all powers, rights, authorities, duties and responsibilities  
17 represented by law to establish school policy of operation,  
18 including the right to determine work assignments under Article  
19 5.1, Section B. Section C of the Article sets forth that the  
20 School District has the right to establish class schedules and  
21 hours of instruction.

22 (Exhibit J-23 "A")

23 14. Article 3 contains the definition of "meet and confer" as  
24 pertains to the 1990-92 Negotiated Agreement which reads as  
25 follows:

26 Meet and confer means the exchange of views and concerns  
27 between the School District and the Exclusive  
28

1 Representative. (Meet and confer items will not appear  
2 in the text of the Master Agreement.)

3 (See "A" above)

#### 4 V. CONCLUSIONS OF LAW

5 1. The Montana Supreme Court has approved the practice of  
6 the Board of Personnel Appeals in using federal court and national  
7 Labor Relations Board (NLRB) precedence as guidelines interpreting  
8 the Montana Collective Bargaining for Public Employees Act as the  
9 State Act is so similar to the Federal Labor Management Relations  
10 Act, State ex rel Board of Personnel Appeals v. District Court, 183  
11 Mont. 223 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No.  
12 45 v. State ex rel Board of Personnel Appeals, 195 Mont. 272 (1981)  
13 635 P.2d 1310, 110 LRRM 2012.

14 2. It is well settled that unilateral changes in mandatory  
15 subjects of bargaining by an employer is an unfair labor practice  
16 (violation of Section 8(a) (5) of the NLRA which is the Federal  
17 counterpart of Section 39-31-401(5), MCA). See NLRB v. Katz, 396  
18 U.S. 736, 50 LRRM 2177 (1962).

19 3. In determining which subjects are mandatory subjects of  
20 bargaining, this Board has utilized the balancing test adopted by  
21 the Kansas Supreme Court in 1973, (N.E.A. v. Shawnee Mission Board  
22 of Education, 512 P.2d 426, 84 LRRM 2223) and followed by the  
23 Pennsylvania Supreme Court in Pennsylvania Labor Relations Board v.  
24 State College Area School district, 337 A.2d 262, 90 LRRM 2081.  
25 The Kansas Supreme Court said:

26 It does little good, we think, to speak in terms of "policy"  
27 versus something which is not policy. Salaries are a matter  
28 of policy, and so are vacation and sick leaves. Yet we cannot

1 doubt the authority of the Board to negotiate and bind itself  
2 on these questions. The key, as we see it, is how direct the  
3 impact of an issue is on the well-being of the individual  
4 teacher, as opposed to its effect on the operation of the  
5 school system as a whole. (Emphasis added) The line may be  
6 hard to draw, but in the absence of more assistance from the  
7 legislature the courts must do the best they can.

8 (N.E.A., supra)

#### 9 De-Minimis Rule

10 4. Defendant argues that changing the duty-free lunch from  
11 45 minutes to 35 minutes is a minor amount of change and cites  
12 Lower Flathead Education Association v. Charle School District No.  
13 7, ULP 14-76 (12/13/76) in support of such contentions. Here, as  
14 contended by Complainant, the above cited case is not dispositive  
15 of the instant matter, as cutting ten minutes out of a forty-five  
16 minute lunch period is not de minimis. Clearly, the reduction  
17 leaves the teachers with 22% less lunch time and such facts  
18 preclude a conclusion supporting Defendant's contentions.

#### 19 Contract-Past Practice

20 5. Defendant convincingly argues that under the management  
21 rights clause of the collective bargaining agreement between the  
22 parties, it was able to make unilateral changes in the duty-free  
23 lunch period assigned teachers in the School District, including  
24 the Northside School. The relevant Sections from the 1990-92  
25 Collective Bargaining Agreement reads in part as follows:

#### 26 Article III - Definitions

#### 27 3.1 Terms and Conditions of Employment

1 Terms and conditions of employment shall mean wages,  
2 hours, fringe benefits and other conditions of employment  
3 subject to those limitations defined as management rights  
4 and prerogatives by the Montana Public Employees  
5 Collective bargaining Law, Title 59, Chapter 16, Revised  
6 Codes of Montana, as amended. (Emphasis added)

7 \* \* \* \* \*

8 3.3 Meet and Confer

9 Meet and confer means the exchange of views and concerns  
10 between the School District and the Exclusive  
11 Representative.... (Emphasis added)

12 \* \* \* \* \*

13 5.1 Powers of the Board

14 The Board has, and shall retain, without limitation, all  
15 powers, rights, authority, duties and responsibilities  
16 conferred upon and vested in it by law to establish  
17 school policy of operation, including, but not limited  
18 to, the right:

19 \* \* \* \* \*

20 B. to employ and re-employ all personnel, determine  
21 their qualifications, conditions of employment and work  
22 assignments....(Emphasis added)

23 C. to select...class schedules, hours of  
24 instruction.... (Emphasis added)

25 (Exhibit A)

26 6. Clearly the School District is required to negotiate in  
27 good faith with respect to wages, hours, fringe benefits and other  
28 conditions of employment and to negotiate an agreement or to

1 negotiate over any questions arriving thereunder. Here, however,  
2 the record does not reflect that the Defendant refused to negotiate  
3 any item. As pointed out by Defendant, the Union did not present  
4 substantial reliable and probative evidence showing where  
5 management refused to review any proposal or refused to take under  
6 advisement any proposal, or refused to discuss any proposal.

7 7. As to the duty-free lunch at issue herein, the record  
8 does not show that the Union set forth any proposals pertaining to  
9 the duty-free lunch hour. But the Union had opportunity to do so.  
10 By letter from Defendant to Union President Desch on September 21,  
11 1992, the Union was informed that the School Board bargaining team  
12 was looking forward to their proposals at the next meeting with the  
13 Union scheduled for September 24, 1992. Further, as argued by  
14 Defendant, if the Union wishes to address those rights as set forth  
15 in article 5.1 of the Contract, the Union has an affirmative  
16 responsibility to bring forth proposals to the bargaining table..  
17 A "union cannot charge an employer with refusal to negotiate when  
18 it has made no attempt to bring employer to the table." NLRB v.  
19 Alva Allen Industries, 369 F.2d 310, 63 LRRM 2515 (CA 8, 1966).  
20 Additionally, in W.W. Grainer Indc. v. NLRB, 860 F.2d 244, 129  
21 LRRM, 2718 (CA 7, 1988), the court found the Union had waived its  
22 right by failure to assert bargaining rights after being given  
23 ample opportunity to bargain over the change of contractors.

24 8. The Complainant argues that the School District and its  
25 administration unilaterally changed a long-established policy of a  
26 duty-free lunch which they allege was clearly understood between  
27 the parties, and they did so without notice. Further, Complainant  
28 contends the School District made the change without inviting

1 discussion or even suggesting that discussion would be allowed.  
2 Here then, the question of the scope of any past practice becomes  
3 the key issue as there were no provisions covering the subject of  
4 duty-free lunch periods in the collective bargaining agreement.

5 9. The overall record reflects that there was some  
6 conversation between the teachers, suggestions from the teachers  
7 and finally a directive given by the principal of Northside School  
8 as pertains to duty-free lunch schedule changes. The directive may  
9 have been a modification and/or a rejection of any and all  
10 conversations, however, as contended by Defendant, the width of any  
11 past practice in this matter can only go to the concept of exchange  
12 of information prior to making a decision when changing work  
13 schedules. And, there are sufficient facts in the record  
14 indicating that the School District has frequently changed without  
15 collective bargaining the time of duty-free lunches and/or the  
16 number and length of such lunches, in the District, not just the  
17 Northside School; i.e., in 1980 the duty-free lunch was changed  
18 from one hour to forty-five (45) minutes.

19 10. Additionally, as convincingly argued by Defendant,  
20 binding practice will not be given that effect unless it is well  
21 established, and strong proof of its existence will ordinarily be  
22 required. Defendant cites Elkouri and Elkouri, How Arbitration  
23 Works:

24 In the absence of a written agreement, 'past practice',  
25 to be binding on both parties, must be (1) unequivocal;  
26 (2) clearly enunciated and acted upon; (3) readily  
27 ascertainable over a reasonable period of time as a  
28 fixed, and established practice accepted by both parties.

(Page 49, supra)

Here, however, as before concluded, the record reflects that there is strong proof of the existence of change to the time, number and length of duty-free lunches, and there is nothing in the record showing a past change to have been grieved by Complainant. Moreover, all the changes concerning the lunch duty appear to have been unequivocal, carried out by the School District and acted upon over numerous years, yet the changes were accepted by the Complainant.

11. The Hearing Officer also notes that time does have a way of modifying everybody's recollection and judgement concerning the chain of events leading up this ULP as filed by Complainant; however, the facts reveal there were some discussions prior to September 1992 about the problems of supervising students at Northside School, and in September 1992 there was discussion on the price of tables for use by the students. Then there is Sue Patch's letter which speaks to the need to identify problems and for further discussions. In all events, the overall record herein reflects that the width of past practice goes to the concept of "exchange of information" prior to directives being issued by the School District, and the Defendant, by past practice, followed such concept which was acquiesced to by teachers and the Union.

12. Complainant argues that Bozeman Education Association v. Gallatin County School district No. 7, ULP No. 43-79 and Polson Education Association v. Lake County Elementary School District, ULP No. 27-88 are controlling in this matter. These cases are dispositive in that they support the contentions of the School

1 District that it had the right to make changes in the duty-free  
2 lunch periods.

3 In Polson the Union, by negotiating additional minutes, waived  
4 their right to complain about an increase in the number of periods  
5 worked in a school day. In the case at hand there were  
6 "discussions" concerning the amount of duty-free lunch time, but  
7 the long standing practice was that the School District ultimately  
8 made the final directive and the Union waived any rights to  
9 complain as it took no action concerning past practice and the  
10 issues herein.

11 In Bozeman, comparing it to the case in hand, there is past  
12 practice established in both cases. In the instant case, clearly  
13 there is a pattern of past practice wherein the School District  
14 after some type of "conversation-discussion" and conscious  
15 exploration with the Union, made limited changes in the number of  
16 duty-free lunch periods and the length of the duty-free lunch  
17 periods throughout the District. But, at all times the teachers  
18 did maintain no less than a 35 minute duty-free lunch period. And  
19 the lunch period was duty-free.

20 13. The Complainant also cites Katz, 369 US 736 (1962) in  
21 support of its position, however, it does not appear that Katz is  
22 controlling in this matter. Here, for reason that the Union by  
23 past practice waived its bargaining rights, Katz is not  
24 dispositive. Nevertheless, as the duty-free lunch issue is a  
25 "condition of employment," it appears to be an appropriate subject  
26 of collective bargaining.

27 14. In summary, the Complainant has failed to show by a  
28 preponderance of the evidence that the Defendant violated Sections



1 39-31-305(1) and (2), MCA, constituting an unfair labor practice as  
2 set forth in Section 39-31-401(5), MCA. Section 39-31-406(5), MCA  
3 states:

4 If, upon the preponderance of the testimony taken, the  
5 Board is not of the opinion that the person named in the  
6 complaint has engaged in or is engaging in the unfair  
7 labor practice, then the Board shall state its findings  
8 of fact. and shall issue an order dismissing the  
9 complaint.

10 (39-31-406(5), MCA)

11 V. RECOMMENDED ORDER

12 It is hereby ordered that the above captioned unfair labor  
13 practice charge of the Wolf Point Education Association against  
14 Wolf Point Public School Districts No. 45 and 45A be Dismissed.

15 SPECIAL NOTICE

16 Exceptions to these Findings of Fact, Conclusions of Law and  
17 Recommended Order may be filed within twenty (20) days of service  
18 thereof. If no exceptions are filed, this Recommended Order shall  
19 become the Final Order of the Board of Personnel Appeals. Address  
20 exceptions to the Board of Personnel Appeals, P.O. Box 1728,  
21 Helena, MT 596024-1728.

22 DATED this 28<sup>th</sup> day of November, 1994.

23  
24 \* \* \* \* \*

25 BOARD OF PERSONNEL APPEALS

26 By:

Gordon D. Bruce

27 GORDON D. BRUCE  
28 Hearing Examiner